



# **Ethics Issues in Contracting**

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# Topics

- Organizational Conflicts of Interest
- Communications with Industry
- Personal Conflict
- Competition



# Organizational Conflicts of Interest

- What is an OCI?
  - Contractor has two or more contracts that have competing interests with each other.
  - FAR 2.101-1 Definition — because of other activities or relationships with other persons,
    - a person is unable or potentially unable to render impartial assistance or advice to the Government,
    - the person's objectivity in performing the contract work is or might be otherwise impaired,
    - a person has an unfair competitive advantage,



# Reasons for OCIs

- Government's Reliance on Contractors
- Consolidation of the Defense Industry
- Multiple Award IDIQ Contracts
- Broadly scoped Statements of Work



# Three Types of OCIs

- Biased Ground Rules
- Impaired Objectivity
- Unequal Access to Information



# Bias Ground Rules

- Contractor in performing one government contract sets the ground rules for another government contract
  - *SSR Engineers, Inc.*, B-282244, 99-2, CPD ¶127 (June 18, 1999) (SSR's work under a 1996 A&E contract to develop a plan and cost estimate to upgrade the electrical system at Kessler AFB was used as a SOW and the government estimate for a 1999 procurement to perform the upgrade work. GAO denied the protest and held that Contracting Officer properly excluded SSR from the 1999 procurement because of an OCI)



# Impaired Objectivity

- Contractor's work under one government contract involves evaluating its own work or the work of an affiliate under another contract
  - *Johnson Controls World Services, Inc.*, B-286714.2, Feb. 13, 2001, 2001 CPD ¶ 20 (GAO found an OCI where a firm would be required to perform installation support services on one hand, and evaluate the efficiency of those services on the other)



# Unequal Access to Information

- Contractor's access to non-public information gives it an unfair advantage in a future competition
  - *VRC, Inc.*, B-310100, Nov. 2, 2007, 2007 CPD ¶ 202.
    - Protest denied; GAO found that Contracting Officer properly disqualified incumbent contractor (protester) from a personnel services procurement on grounds that incumbent contractor had "unequal access to information"
    - Contracting Officer reasonably found that OCI existed based on fact that individual employed by company:
      - ✓ Had ownership ties to subcontractor on incumbent contract





# Contractor Mitigation Plans

- Purpose
  - Implement procedures to prevent the release of proprietary or procurement sensitive information
  - Preserve contractor's right to participate in present and future competitions associated with the proprietary of procurement sensitive information
  - Bind the Corporation
- Useful for Unequal Access to Information OCIs
- Not useful for "biased ground rules" and "impaired objectivity" OCIs
- Non-disclosure agreements (NDAs)
  - Bind the individual contractor employees



# Navy and Marine Corps Policy Encourages Communications with Industry

- DEPSECDEF Memo, *Policy for Communication with Industry* (June 21, 2010)
- OFPP, Policy Memorandum, “*Myth-Busting*”: *Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process* (February 2, 2011)
- Under Secretary of the Navy Memo, *Communication with Industry*, (May 4, 2011)
- VCNO, *Ethics Guidance: Communications with Industry* (November 14, 2011)
- OFPP, “*Myth-Busting 2*”: *Addressing Misconceptions and Further Improving Communication During the Acquisition Process* (May 7, 2012)



# **Navy and Marine Corps Best Practices for Communicating with Industry**

- Consult with OGC counsel to address business issues relating to acquisition integrity and unfair competitive advantage
- Publicize planned meetings – openness and transparency
- Prefer group settings to one-on-one meetings or interviews — but one-on-one meetings are not discouraged
- Require read-aheads of planned discussion topics
- Require an Agenda: define in advance the topics that are off-limits
- Identify acquisition issues: industry representative<sub>1</sub> notifies, in advance, all current contracts or proposals



# When Should Communications with Industry End?

- After the Draft RFP is issued?
- After the RFP is issued?
- After receipt of proposals?



# One-on-One Meetings Not Prohibited

- What about . . .
  - preferential treatment?
  - organizational conflict of interest?
  - proprietary data?



# What Information Cannot be Communicated with Industry?

- Proprietary data
- Source Selection Information
  - Cost proposal
  - Technical proposals
  - Source selection plans
  - Technical evaluation
  - Cost evaluation
  - Competitive range determinations
  - Ranking of proposals
  - SSEB, SSAC, SSA reports
  - Any other information that would jeopardize the integrity of the procurement as determined by the contracting officer



# Penalties For Government Employees

- Trade Secrets Act 18 U.S.C. §1905
  - Criminal statute that prohibits Government employees from releasing proprietary data; carries penalties of up to one year in jail or fines or both; *and* losing your job
- Procurement Integrity Act, 41 USC § 2105
  - Government employee that exchanges SSI for anything of value or to obtain or give a person a competitive advantage in the award of a Federal agency procurement contract carries a criminal penalty of up to 5 years in jail or fines or both



# **Post-Employment Restrictions**

## **18 USC § 207**

- Applies to former Government personnel and carries a penalty of up to 5 years in jail and fines
- Contractors could be subject to administrative actions (e.g., suspensions and debarments) and criminal prosecution (e.g., conspiracy)





# Post-Employment Restrictions

## 18 USC § 207 — Lifetime Ban

- Former Government employees have a Lifetime communication and appearance ban to represent someone else to the Government on a “*particular matter*” that they worked on while in Government service
- Communication includes
  - Email
  - Phone call
  - Texting
  - Faxing
- Appearance ban may include mere physical presence



# Post-Employment Restrictions

## 18 USC § 207 — Two-Year Ban

- Former Government employees have a Two-Year communication and appearance ban to represent someone else to the Government on a “*particular matter*” in which the employee knows or reasonably should know was actually pending under his Official Responsibility within the one-year period prior to the termination of Government service



# Post-Employment Restrictions 18 USC § 207 — Senior Officials

- Former Senior Officials (Senior Executive Service, Admirals, General Officers) have a One-Year “cooling off” communication and appearance ban with former agency
- Includes any communication and any appearance on any matter



# Procurement Integrity Act

## 41 USC § 2104

- Former procurement officials have a one-year ban on compensation with a contractor who wins a contract award of more than \$10M
- Procurement officials include:
  - Procuring Contracting Officer
  - Source Selection Authority
  - Member of the Source Selection Evaluation Board
  - Chief of Financial/Technical Evaluation Team
  - Program Manager/Deputy Program Manager
  - Administrative Contracting Officer; or
  - Decision-Maker Regarding (award, overhead rates, subcontracts, payments, and settlements)

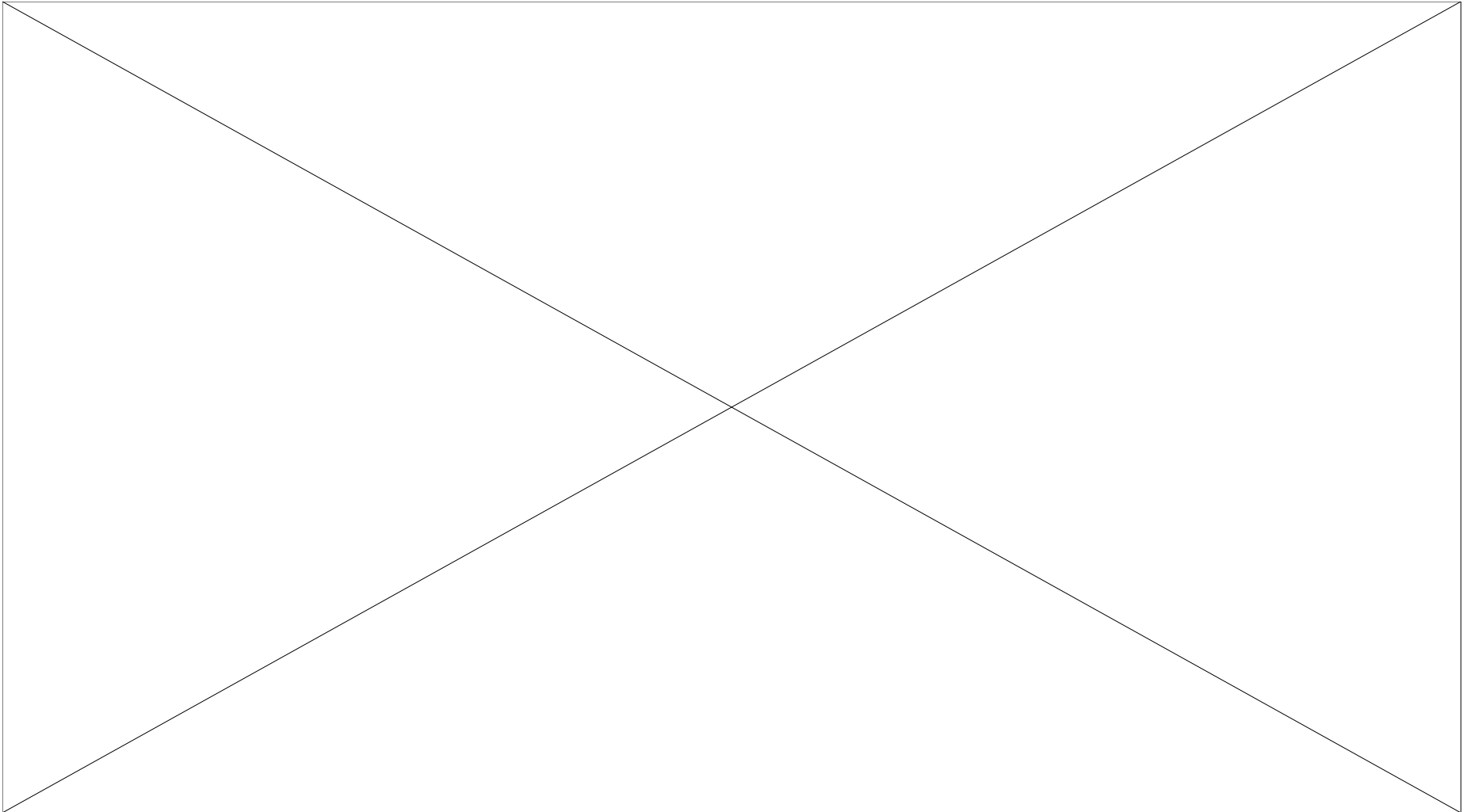


# Personal Conflict

- *KAR Contracting, LLC*, B-310454, Dec. 19, 2007.  
Protests denied and VA contracting officer reasonably found protester was ineligible for award of two construction projects on the grounds that award to protester would create the appearance of an impropriety; protester's owner had served as the COTR on both projects during design and had helped prepare the drawings while a government employee.
  - Where there is an apparent conflict of interest, an agency may exclude an offeror from a procurement to protect the integrity of the procurement system, even if no actual impropriety can be shown, provided that the agency's determination is based on fact and not mere innuendo and suspicion
  - Post-employment restrictions of 18 U.S.C. § 207 do not set outer boundaries for a CO's reasonable exercise of discretion about whether the award of a contract will create the appearance of impropriety. Even if there would be no violation of the post-employment restrictions, that would not mean there was no reasonable basis for concluding that offeror was ineligible for award



# Competition





# QUESTIONS?

